No. 89-700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP,

Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether an affirmative action program implemented by the Federal Communications Commission to enhance diversity in programming by increasing minority ownership of broadcast stations is unconstitutional because it is assertedly not "narrowly tailored" to serve a concededly compelling governmental purpose.

2. Whether a reviewing court may disregard Congress' express approval and adoption of such a program.

LIST OF PARTIES

The parties in the court below were petitioner Astroline Communications Company Limited Partnership, respondent Shurberg Broadcasting of Hartford, Inc., and the Federal Communications Commission. Petitioner Astroline Communications Company Limited Partnership is a limited partnership comprising two general partners, Richard P. Ramirez and WHCT Management, Inc., and one limited partner, Astroline Company.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 876 F.2d 902, and is reprinted in the appendix to the petition for a writ of certiorari at 1-112a. The opinions of the Federal Communications Commission are reported at 68 F.C.C.2d 979 and 99 F.C.C.2d 1164, and are reprinted in the appendix to the petition for a writ of certiorari at 113-129a and 130-140a, respectively.

JURISDICTION

The judgment of the court of appeals (141a) was entered on March 31, 1989. Timely petitions for rehearing, and suggestions for rehearing *en banc*, were denied on June 16, 1989 (143a, 155a). On September 13, 1989, the Chief Justice ordered that the time within which to file a petition for a writ of certiorari be extended to and including Sunday, October 29, 1989. Pursuant to Sup. Ct. R. 29.1, the petition in this case was filed on October 30, 1989, the next day not a Sunday or a federal legal holiday. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fifth Amendments to the Constitution, the Communications Amendments Act of 1982, 47 U.S.C. §§ 309(i)(3)(A) and (C)(ii), the Joint Resolution, Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987), and the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186 (1988), are set out at 161a *et seq.* of the appendix to the petition for a writ of certiorari. The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020-21 (1989) is set out as an appendix to this brief.

STATEMENT

A. Development of the distress sale policy and the FCC's other minority ownership policies.

More than a decade ago, the Federal Communications Commission ("FCC") found that the broadcast media failed adequately to reflect the views of minorities because minorities were acutely underrepresented among owners of broadcast stations. Minorities owned fewer than one per cent of U.S. broadcast stations, even though they comprised about 20 per cent of the nation's population. The FCC had attempted to stamp out employment discrimination in the broadcast industry. It had also required licensees to consult with leaders of the minority communities in their service areas to ascertain community interests and develop responsive programming. Despite its efforts, the FCC was "compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media." *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979, 980 (1978) (133a) ("*1978 Policy Statement*").[1] This situation, the FCC found, was "detrimental not only to the minority audience but to all of the viewing and listening public," and inconsistent with the FCC's obligations under the First Amendment and Section 1 of the Communications Act of 1934, 47 U.S.C. § 151, to advance diversity of broadcast programming. 68 F.C.C.2d at 980-81 (133a).

The FCC's view of its statutory and constitutional responsibilities to increase minority participation in broadcasting stemmed in part from the promptings

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[1] References to the Appendix to the Petition for a Writ of Certiorari are given as "___ a."

of a series of decisions by the United States Court of Appeals for the District of Columbia Circuit which, under 47 U.S.C. § 402(b), possesses exclusive jurisdiction to review the FCC's licensing decisions. In *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 860 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), the court admonished the FCC not to be content with regulatory supervision of existing licensees, but also to "seek in the public interest to certify as licensees those who would speak out with fresh voice, would most naturally initiate, encourage and expand diversity of approach and viewpoint." In *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213-14 n.36 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972), the court observed that only a dozen out of the 7,500 broadcast licenses then in force were held by minorities, a "dismaying situation" that helped persuade the court to invalidate an FCC policy that would have given an insurmountable advantage to incumbent licensees. "As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies." *Id.*

The court soon thereafter held that minority ownership, when the owners fully participated in the station's management, should count in the applicant's favor in a comparative hearing.

> It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, but in good faith as broadening community representation, gives a local minority group media entrepreneurship. . . . [W]hen minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded.

TV 9, Inc. v. FCC, 495 F.2d 929, 937-38 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). *See also Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975) ("black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry") (footnote omitted).

In its *1978 Policy Statement*, the FCC found that despite the promulgation and enforcement of its equal employment opportunity and ascertainment rules, and despite the award of merit in comparative hearings to prospective minority licensees, "the continuation of an extreme disparity between the representation of minorities in our population and in the broadcasting industry requires further Commission action." 68 F.C.C.2d at 982 (137a) (footnote omitted). That action included, in part, the adoption of the distress sale policy at issue here.[2]

The distress sale policy permits licensees whose licenses are designated for a revocation hearing, or whose renewal applications are designated for hearing on basic qualification issues, to transfer or assign their licenses at a discounted "distress sale" price to purchasers with a significant minority ownership interest.

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[2] At the same time, the FCC adopted a policy of issuing tax certificates to licensees who proposed to transfer their licenses to parties with a significant minority interest. A tax certificate permitted the transferor to defer capital gains taxation on the transaction. 68 F.C.C.2d at 983 (137-38a).

68 F.C.C.2d at 983 (138a).[3] The policy gives licensees at risk for revocation the incentive to relinquish their licenses through a distress sale (and salvage some of their investment), while simultaneously serving the public interest by increasing the number of minority owners of broadcast stations.[4] The discount forces the departing licensee to pay a penalty for its apparent failure to discharge its responsibilities, while facilitating the minority broadcaster's acquisition of the license. At the same time, the FCC conserves its resources by encouraging questionable licensees to exit without years of hard-fought proceedings in which the licensee seeks to ward off revocation.

The FCC has not earmarked any number or percentage of licenses for distress sale treatment. The FCC has not (and cannot) require any licensee to agree to a distress sale; the licensee retains the option of defending its qualifications through the hearing process.

In 1982, Congress expressly endorsed the FCC's several policies aimed at increasing minority owner-

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[3] Initially, purchasers qualified for the distress sale policy if a minority owned more than a 50 per cent, or controlling, interest in the purchasing entity. 68 F.C.C.2d at 983 (138a). In 1982, the FCC extended eligibility for the policy to limited partnerships in which the general partner was a member of a minority group and owned at least 20 per cent of the entity. *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982).

[4] Ordinarily, a licensee whose basic qualifications are in question cannot sell or assign its license, because "a licensee or permittee has nothing to assign or transfer unless and until he has established his own qualifications . . . ." *Northland Television, Inc.*, 42 Rad. Reg. 2d (P & F) 1107, 1110 (1978). *See also Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964).

ship. Congress passed the Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, empowering the FCC to substitute a lottery for the comparative hearing process, but requiring any lottery system to perpetuate the FCC's minority ownership policies. The Conference Committee observed that as of the end of 1981, only about two per cent of broadcast stations, commercial and noncommercial, were minority-owned. H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43-44, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2237, 2287-88. The Committee declared:

> The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the number of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so.

Id. at 43. The Committee referred expressly to the FCC's promulgation of the distress sale policy as "[e]vidence of the need for such preferential treatment [that] has been amply demonstrated by the Commission, the Congress, and the courts." *Id.* at 44.

In *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), the D.C. Circuit upheld against constitutional challenge a preference for a minority applicant in a comparative hearing where the service area had only a small minority community. The court accepted the FCC's view that the public interest is served by providing "the listening audience as a whole with programming choices that reflect a diversity of

viewpoints and perspectives," and not simply by "providing particular minority audiences with minority broadcasters responsive to their needs." *Id.* at 609. The court found that

> over the past decade the courts, the Commission, and the Congress have all concluded that promotion of minority owned broadcast media facilities, where the minority owner will be fully involved in broadcast management, is an important public policy objective within the FCC's "public interest" mandate.

Id. at 607.

The *West Michigan* court found in Congress' adoption of the Communications Amendments Act two years earlier both confirmation of the FCC's view of its public interest responsibilities, and powerful evidence of the constitutionality of the FCC's minority ownership policies. The court found that Congress had "explicitly mandated that the FCC follow a minority ownership promotion program that would clearly rest on the very view of the public interest that the Commission has here followed . . . ." *Id.* at 612. Relying on *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the court held: "Any doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goals and means." *Id.* at 615.[5]

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[5] In *Loyola University v. FCC*, 670 F.2d 1222, 1225-26 (D.C. Cir. 1982), the court held that the FCC had properly considered the expansion of minority ownership as a public interest factor weighing in favor of modification of its clear channel rules to permit additional stations to use those channels. The court cited with evident approval the FCC's conclusion that "all three

In *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *rehearing en banc granted* (Oct. 31, 1985), the panel, in an opinion by Judge Tamm in which Judge Scalia joined, found that the FCC's enhancement in comparative hearings for female applicants exceeded its authority under the Communications Act. By contrast, Judges Tamm and Scalia found no reason to disturb the D.C. Circuit's long history of approval of the FCC's minority ownership policies, expressly including the distress sale policy: "Under our decisions, the Commission's authority to adopt minority preferences even apart from the lottery process—at least where such preferences are tied to minority participation in the management of broadcast facilities—is clear." *Id.* at 1196.

In 1986, however, the FCC concluded that the constitutionality of its minority ownership policies was open to question, and asked the D.C. Circuit *en banc* to remand the *Steele* case to the FCC for a reconsideration of those policies. The court remanded the case, and the FCC opened a rulemaking docket for a reexamination of its policies. *Reexamination of the Commission's Comparative Licensing, Distress Sales, and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C. Rcd. 1315 (1986), *modified*, 2 F.C.C. Rcd. 2377 (1987). The FCC also sought and obtained remands for the same purpose in both the instant case and in *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *petition for cert. granted sub nom. Metro Broadcasting Inc. v. FCC*, 58 U.S.L.W. 3427 (U.S.

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branches of government have recognized the importance of fostering minority participation in ownership and operation of broadcast stations." *Id.* at 1226 n.9.

Jan. 8, 1990) (No. 89-453), in which a disappointed nonminority applicant had challenged the constitutionality of minority enhancements in a comparative hearing.

Congress then interceded and forbade the FCC to use its appropriated funds

> to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, *distress sales* and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses . . .

Pub. L. No. 100-202, 101 Stat. 1329 (1987) (emphasis added) (162a). The Senate Appropriations Committee Report said: "The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals." S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). Congress has since twice reenacted a similar ban on disturbing the distress sale policy and the FCC's other minority ownership policies, through fiscal 1989 and fiscal 1990. Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988) (163a); Pub. L. No. 101-162, 103 Stat. 1020-21 (1989) (appended hereto).

After passage of the 1987 appropriations legislation, the FCC closed its reexamination of its minority ownership policies. The FCC then defended the constitutionality of those policies in comparative hearings in *Winter Park*, and the distress sale policy in the instant case. The D.C. Circuit upheld the comparative hearing policy in *Winter Park*, holding that the "issue

. . . of the FCC's use of a qualitative enhancement for minority ownership is easily resolved" under the controlling authority of *West Michigan*. 873 F.2d at 353. The court found that the policy, as upheld in *West Michigan*, was not undermined by this Court's decisions in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) or *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986), and that the preference's constitutionality was reinforced by Congress' "express approval" in the 1982 lottery statute and the 1987 appropriations legislation. *Winter Park*, 873 F.2d at 355.

B. Application of the distress sale policy in this case.

1. The FCC's decision.

In November 1980, the FCC designated the renewal application of Faith Center, Inc. to operate WHCT-TV (Channel 18 in Hartford, Connecticut) for hearing to determine whether Faith Center was qualified to remain a licensee. *Faith Center, Inc.*, 99 F.C.C.2d 1164, 1166-67 (1984) (115-116a). Faith Center twice applied for, and received, the FCC's authorization to effect a distress sale of the license to minority buyers, but neither sale was consummated. *Id.* (116a).

In December 1983, Shurberg Broadcasting of Hartford, Inc. and its principal, Alan Shurberg (collectively "Shurberg") filed a competing application for Channel 18. Shurberg petitioned the FCC to designate its application for a comparative hearing with Faith Center's renewal application, arguing (among other points) that the distress sale policy was unconstitutional. *Id.* at 1167, 1170-71 (117a, 122a). In June 1984, Faith Center again requested the FCC's authorization to accomplish a distress sale, this time to Astroline Com-

munications Company Limited Partnership ("Astroline"), a minority-controlled limited partnership whose principal general partner was Richard P. Ramirez. *Id.* at 1166-67, 1172-73 (116-117a, 125a).

In December 1984, the FCC denied Shurberg's petition, rejecting its constitutional arguments as "without merit." *Id.* at 1170-71 (122a). The FCC reiterated its finding in its *1978 Policy Statement* that created the distress sale policy of "an acute underrepresentation of minorities among the owners of broadcast stations and that views of racial minorities were inadequately represented in the broadcast media." *Id.* at 1171 (122a). The FCC noted that "increasing minority ownership of broadcast stations would result in diversity of control of a limited resource, the broadcast spectrum, and would result in a more diverse selection of programming for the entire viewing and listening public." *Id.* at 1171 (122-123a).

The FCC also pointed to Congress' passage of the Communications Amendments Act of 1982, with its express requirement that significant preferences for minority applicants be incorporated into any lottery system that might supplant the comparative hearing process. *Id.* at 1171-72 (123-124a). The FCC observed that the Conference Report had relied on the FCC's *1978 Policy Statement*, including the factual basis developed by the FCC Minority Ownership Task Force, *Report on Minority Ownership in Broadcasting* (1978), "as evidence of the need for the type of preferential treatment of minorities contained in the legislation." *Id.* at 1171 (124a). The FCC said: "Thus Congress, which has the broadest remedial power of any governmental entity, has recognized the need for and

approved the implementation of the minority ownership policies set forth in the 1978 policy statement." *Id.* at 1171-72 (124a) (footnote omitted).

Shurberg also challenged Astroline's *bona fides* as a minority-controlled purchaser. The FCC examined Astroline's ownership structure, and determined that Mr. Ramirez's role as Astroline's controlling general partner complied with the FCC's established criteria for limited partnerships' eligibility for distress sales. *Id.* at 1172-73 (125-126a). The FCC approved Faith Center's application for a distress sale to Astroline, on the condition that Astroline establish its qualifications to be a licensee (which it did). *Id.* at 1172 (124a).

2. The D.C. Circuit's decision.

Shurberg filed a petition for review in the D.C. Circuit, and four years elapsed between the filing of the petition and the court's decision. In the meantime, as noted above, the FCC obtained a remand of the case for reconsideration of the constitutionality of the distress sale policy, and terminated that inquiry in response to Congress' 1987 appropriations legislation forbidding the FCC to repeal or alter the distress sale policy, a prohibition that Congress has reenacted for the two succeeding fiscal years and that remains in effect today.

In March 1989, a divided court of appeals found the distress sale policy unconstitutional. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989). Judges Silberman and MacKinnon, who constituted the majority, agreed only on a one-paragraph *per curiam* opinion that said, in pertinent part, that

> the FCC's minority distress sale program unconstitutionally deprives Alan Shurberg and Shurberg Broadcasting of their equal protection rights under the Fifth Amendment because the program is not narrowly tailored to remedy past discrimination or to promote programming diversity. Specifically, the program unduly burdens Shurberg, an innocent nonminority, and is not reasonably related to the interests it seeks to vindicate.

876 F.2d at 902 (2a). Judge Silberman and Judge MacKinnon each wrote separately; Chief Judge Wald dissented.

Judge Silberman wrote that the distress sale policy could not be justified as a remedy for discrimination because neither the FCC nor the Congress had linked minority underrepresentation in the broadcast industry to discrimination by the FCC itself, or to particularized discrimination in the broadcast industry. *Id.* at 914 (27a). He rejected societal discrimination as a basis for the program, doubting "that Congress may act without *some* quantum of particularized evidence of the effects of societal discrimination in the relevant industry." *Id.* at 915 (28a) (emphasis in original). He also found that the distress sale policy was not narrowly tailored as a remedial measure because (1) it was not tied to the effects of past discrimination; (2) the FCC had not considered race-neutral alternatives; and (3) the program imposed an undue burden on Shurberg, which he analogized to being "disqualified from the *only* job currently available in a given community solely because of . . . race." *Id.* at 919 (36a) (emphasis in original).

Judge Silberman accepted with considerable reluctance that the promotion of programming diversity is a sufficiently compelling governmental purpose to support a race-conscious policy, even in the absence of prior discrimination. *Id.* at 920 (39a). But he rejected the nexus found by the FCC, Congress, and the D.C. Circuit's prior decisions between diversity of station ownership and diversity of expression. In particular, he faulted Congress for its failure to make "historical findings of fact," *id.* at 923 (45a), for its omission to present or cite "evidence . . . of a nexus between program diversity and minority ownership," *id.* (46a), and for the absence "of any material developed in congressional hearings." *Id.* at 924 (47a).

Judge MacKinnon concurred in the judgment, but he disagreed pointedly with Judge Silberman's reasoning in important respects. In particular, Judge MacKinnon would not join in Judge Silberman's rejection of Congress' determination that a nexus exists between diversity of station ownership and programming diversity. "Congress is not required to write legal opinions to justify its legislation," Judge MacKinnon said, finding it "difficult to dispute the assertion that Congress found there was a nexus between minority ownership and programming diversity." *Id.* at 932 (64a, 66a).

Judge MacKinnon concluded, however, that the policy was not narrowly tailored to achieve its goals because "there is no actual limitation, in theory or in practice, on the number of licenses that may be so transferred," and because "[c]ompliance is voluntary and the program contains no assurance that any programming diversity will be achieved." *Id.* at 931 (63a) (footnote omitted). Recognizing that only 38 li-

censes were transferred during the first ten years of the policy's operation, Judge MacKinnon faulted the policy because it might result in the transfer of valuable broadcast properties in major markets such as New York, Boston, and Los Angeles. *Id.* at 930 (61a). Judge MacKinnon also found that the policy unduly burdens nonminorities because it forecloses them from obtaining a particular license in the community where they desire to do so, and "will necessarily exclude *every* nonminority individual in *every* distress sale." *Id.* at 934 (emphasis in original) (68a).

Chief Judge Wald dissented, describing the distress sale policy as "a unique type of governmental access program not heretofore passed on by the Supreme Court." *Id.* at 934 (70a). She wrote that

> [i]n casting off a thoughtfully conceived and monitored program aimed at attaining a legitimate congressionally mandated end, the majority has too rigidly applied Supreme Court affirmative action guidelines designed for other types of programs, ignored firm precedents in this circuit, and failed to credit the explicit intent of Congress.

Id. (70a).

Chief Judge Wald disagreed with Judge Silberman's conclusion that Congressional findings of a nexus between ownership and programming could be judicially disregarded. In *Fullilove*, she wrote, this Court "quite clearly rejected the notion that courts may inquire into the sufficiency of congressional deliberations." *Id.* at 940 (82a). Rather, she concluded, "deliberativeness must be presumed so long as Congress had

before it sufficient information for the formation of a considered opinion." *Id.* (82a) (footnote omitted).

Chief Judge Wald concluded that diversity of programming expression is a compelling governmental purpose, that Congress and the FCC had found a nexus between that purpose and diversity of ownership, and that the method chosen by the FCC and endorsed by Congress "clearly meets the test of 'narrow tailoring.' " *Id.* at 947 (97a). In particular, she found no undue burden on nonminorities: "[T]he near-monopoly exercised by nonminorities over broadcast media—they control approximately 98% of all broadcast licenses—and the very limited circumstances in which the distress sale policy can be invoked, suggest that the burden the policy places on nonminority applicants is acceptable." *Id.* at 952 (109a) (footnote omitted).

Both the FCC and Astroline filed timely petitions for rehearing and suggestions for rehearing *en banc*. The FCC's petition said that the majority "erred in holding the distress sale policy unconstitutional" because "the majority did not defer to Congress' judgment that promoting broadcast diversity required limiting use of the distress sale policy to minority buyers in the small numbers of situations each year where the FCC orders a hearing on a broadcast licensee's basic qualifications." FCC Petition for Rehearing and Suggestion for Rehearing *En Banc* 2, 3. The FCC said: "The panel majority . . . has adopted such a low threshold of burden on non-minorities in construing the narrowly tailored standard as to invalidate almost any race conscious programs that a federal agency or Congress could devise." *Id.* at 14.

The suggestions for rehearing *en banc* were denied by a 5-5 vote among the judges in regular active service on the court. Chief Judge Wald dissented from the denial of rehearing *en banc*, joined by Judges Robinson, Mikva, Edwards, and Ruth B. Ginsburg. They joined in Chief Judge Wald's dissent, in which she wrote that "the continued use of the distress sale policy has been mandated by an Act of Congress." 876 F.2d at 958 (157a). She wrote that the panel decision created "substantial doubt" about whether the advancement of diversity could justify *any* race-conscious program, "clearly [calling] into question the constitutionality of affirmative action programs in student admissions at public universities." *Id.* at 959 (159a) (footnote omitted).

SUMMARY OF ARGUMENT

I. The FCC's licensing policies—including the distress sale policy—are founded on the First Amendment principle of advancing diversity of expression through the public resource of the broadcast spectrum. Implementation of First Amendment values is a compelling governmental purpose of sufficient gravity to sustain the distress sale policy. This Court has never limited the use of racial distinctions to the remedial context. Here, where the distress sale policy bears Congress' explicit approval, embodied in four separate legislative enactments, such a limitation would be unwarranted. Unlike a policy of a unit of state or local government, the distress sale policy represents an unambiguous exercise of Congress' legislative authority. Moreover, Congress' approval extended not only to the distress sale policy's goal, but to its means as well.

II. The court of appeals erred in finding the distress sale policy not to be narrowly tailored to achieve its concededly compelling goal. The court of appeals adopted such a minimal threshold for undue burden on nonminorities that it is hard to see how any race-conscious policy could survive, especially in the broadcast industry. Moreover, the court of appeals refused to accept Congress' determination, based on an extensive record of fact-finding and decades of oversight in the broadcast industry, that diversifying broadcast station ownership to hitherto excluded minorities can reasonably be expected to result in diversification of programming expression. By sifting the factual basis for Congress' legislative finding, the court of appeals treated Congress as though it were an inferior court or administrative agency, thus raising fundamental separation of powers issues.

ARGUMENT

I. THE DISTRESS SALE POLICY ADVANCES A COMPELLING GOVERNMENTAL PURPOSE.

Congress has charged the FCC with the regulation of the broadcast industry under the public interest standard of the Communications Act. This Court has repeatedly held that the public interest requires the FCC to give paramount consideration to the audience's First Amendment right to receive as diverse an array of programming expression as the limitations of the broadcast spectrum will accomodate. Over the past 20 years, Congress, the FCC, and the court of appeals have consistently found that the virtual exclusion of minorities from the ownership of broadcast stations impedes the realization of this interest. At the direction of Congress and the court, the FCC has

adopted policies—including the distress sale policy at issue in this case—to advance diversity of expression by eroding the "near-monopoly exercised by nonminorities over broadcast media . . . ." 876 F.2d at 952 (109a) (Wald, C.J., dissenting). All three branches of government have accepted the interest in diversity of broadcast expression as sufficiently compelling to warrant the limited use of race-conscious measures such as the distress sale policy.

A. Race-conscious policies do not violate the Fifth Amendment if they are narrowly tailored to accomplish a compelling governmental purpose.

Policies that take race into account survive strict scrutiny under the Fifth Amendment if those policies (1) serve a compelling governmental purpose, and (2) are narrowly tailored to accomplish that purpose. *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980); *see also Regents of the University of California v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J.); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 274 (1986); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 721 (1989).[6] Strict scrutiny, however, is not a synonym for unconstitutionality; that scrutiny must not be "strict in theory, but fatal in fact." *Fullilove*, 448 U.S. at 507 (Powell, J.).

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[6] Although the Court has not definitively adopted a single test, we analyze the distress sale policy under strict scrutiny because it satisfies even that exacting standard. "[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach a consensus on the appropriate constitutional analysis." *United States v. Paradise*, 480 U.S. 149, 166 (1987) (footnote omitted).

Remedying racial discrimination, whether discrimination by the governmental unit involved or pervasive discrimination practiced in a particular industry, constitutes such a compelling purpose, and warrants appropriately tailored policies that make racial or ethnic distinctions. *Fullilove*, 448 U.S. at 477-78; *United States v. Paradise*, 480 U.S. 149, 166 (1987).

Other constitutional interests have also been recognized as important enough to warrant race-conscious governmental policies. In particular, a public university's interest in assuring racially diverse enrollment presents such an interest. "[T]he right to select those students who will contribute the most to the 'robust exchange of ideas,' . . . invokes a countervailing constitutional interest, that of the First Amendment." *Bakke*, 438 U.S. at 313 (Powell, J.). In *Bakke*, the selection of an ethnically diverse student body was deemed of "paramount importance in the fulfillment of [the university's] mission" not for its own sake, but because of the diverse array of expression—the " 'robust exchange of ideas' "—that those students would bring to the university. *Id.*

This Court has never held that diversity in a public university's student body is the only non-remedial interest that is important enough to justify a race-conscious policy.

> [C]ertainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies.

Wygant, 476 U.S. at 286 (O'Connor, J.) Individual Justices have suggested several such policies, related to the diversity interest that *Bakke* held could sustain a race-conscious university admissions policy. *See Wygant*, 476 U.S. at 314-16 (Stevens, J., dissenting) (interests in diversity in public school faculty or in integrated police force); *id.* at 288 n.* (O'Connor, J.) (rejected "role model" goal "should not be confused with the very different goal of promoting racial diversity among the faculty"); *Croson*, 109 S. Ct. at 731 (Stevens, J., concurring).

B. The First Amendment guides the FCC's exercise of its licensing powers.

The FCC's broadcast licensing policies must reflect and implement basic First Amendment values.

> "[T]he 'public interest' standard necessarily invites reference to First Amendment principles," *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973), and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S., at 20.

FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 795 (1978).[7] The dominant First Amendment interest is not the broadcaster's right to speak, but the public's right to receive that expression. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). *See also FCC v. League of Women Voters*, 468 U.S. 364, 377-78 (1984).

[7] *See also FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984) ("the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area"); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) ("the policy of promoting the widest possible dissemination of information from diverse sources [is deemed] consistent with both the public-interest standard and the First Amendment").

In order to discharge its First Amendment responsibilities, the FCC must walk what this Court has described as a "tightrope" between direct content regulation of broadcasting, which would itself jeopardize First Amendment values, and abdication of use of the limited broadcast spectrum to the private discretion of licensees. *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 117 (1973). The FCC has therefore pursued a policy of selecting a diverse group of licensees who can "serve in a sense as fiduciaries for the public" (*League of Women Voters*, 468 U.S. at 377) without direct intervention by the FCC. "[I]f the public's interest in receiving a balanced presentation of views is to be fully served, we must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust." *Id.* at 378.

C. The FCC's fundamental responsibility to diversify ownership of broadcast stations requires it to address the exclusion of minorities from the broadcast industry.

In order to recruit broadcasters who will effectively discharge their responsibilities as fiduciaries for the public, the FCC has, for the past quarter-century, made diversity of ownership a central criterion in its

licensing decisions. *National Citizens Committee for Broadcasting*, 436 U.S. at 794-95; *Citizens Communications Center*, 447 F.2d at 1213 n.36 ("The Supreme Court itself has on numerous occasions recognized the distinct connection between diversity of ownership of the mass media and the diversity of ideas and expression required by the First Amendment.") *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965) ("Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.") (footnote omitted).

The FCC concluded that it could not effectively pursue a policy of diversifying control of the broadcast media while remaining indifferent to the incontrovertible fact that a large part of the American public—racial and ethnic minorities—were effectively excluded from the ranks of broadcast licensees, to the detriment not only of minority members of the audience but also to the rest of the public who were deprived of the views of minorities on issues of public importance.

The compelling nature of this interest was clear to the D.C. Circuit, which upheld the legitimacy and importance of the FCC's goal in an unbroken series of seven decisions over nearly twenty years[8] —unbroken,

[8] *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972); *TV 9, Inc. v. FCC*, 495 F.2d 929, 937-38 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975); *Loyola University v. FCC*, 670 F.2d 1222, 1225-26 (D.C. Cir. 1982); *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985); *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *rehearing en banc granted* (Oct. 31, 1985); *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *petition for cert. granted sub nom. Metro Broadcasting Inc. v. FCC*, 58 U.S.L.W. 3427 (U.S. Jan. 8, 1990) (No. 89-453).

that is, until the decision in this case.[9] The compelling nature of the interest was clear to Congress, which has endorsed the FCC's policies toward that end no fewer than four times in positive legislation.

> As this Commission, the courts, and the Congress have recognized, there is a critical underrepresentation of minorities in broadcast ownership, and full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversification of ownership which are at the heart of the Communications Act and the First Amendment.

Waters Broadcasting Corp., 91 F.C.C.2d 1260, 1264 (1982) (footnote omitted), *aff'd, West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

Thus, unlike the state board of regents' admissions plan struck down in *Bakke*, the county board of ed-

[9] Judge Silberman wrote that "[i]t is doubtful that the FCC has a compelling interest in fostering programming diversity" (876 F.2d at 926) (52a). Earlier in his opinion, he acknowledged that "[f]or the time being . . . our precedent compels the conclusion that there is a compelling government interest in increasing diversity of programming." *Id.* at 920 (39a). Judge MacKinnon concurred solely on the issue of narrow tailoring, and therefore did not reach the question of whether a compelling interest existed. *Id.* at 930 n.11 (59-60a).

ucation's teacher layoff plan invalidated in *Wygant*, or the city council's set-aside found unconstitutional in *Croson*, the distress sale policy and the FCC's other minority ownership policies result from the unambiguous assertion of federal authority. Moreover, the authority of Congress—not merely the FCC and the lower courts—stands behind the distress sale policy. As Chief Judge Wald wrote, "[T]he distress sale program is today a deliberately chosen congressional policy, embodied in legislation passed by the House and Senate and signed by the President." 876 F.2d at 938 (79a). Here, as in *Fullilove*, the Court must "pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President." 448 U.S. at 473. Though "in no sense does that render it immune from judicial scrutiny," *id.*, it is "fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id.* at 483.[10] *See also Columbia Broadcasting System*, 412 U.S. at 102 ("Thus, in evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress and the experience of the Commission.")[11]

[10] In *Croson*, the plurality stressed the limited powers of subordinate governmental units compared to the plenary power of Congress: "Justice Powell made it clear [in *Bakke*] that other governmental entities might have to show more than Congress before undertaking race-conscious measures." 109 S. Ct. at 719. *See also Bakke*, 438 U.S. at 295 n.34 (Powell, J.) ("mere *post hoc* declarations by an isolated state entity" were insufficient predicate for race-conscious program).

[11] Both Congress and the FCC saw the distress sale policy as a remedy for prior discrimination, as well as a means of advancing diversity of expression. The Conference Report on the Communications Amendments Act of 1982 stated: "The Conferees find that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2237, 2287. *See also West Michigan*, 735 F.2d at 616; *Faith Center, Inc.*, 99 F.C.C.2d at 1171. The distress sale policy thus represents not only an exercise of Congress' Commerce Clause authority, but also its equal protection power under Section 5 of the Fourteenth Amendment to remedy prior discrimination.

D. The court of appeals gave no weight to Congress' approval of the distress sale policy, or the FCC's discretion in administering it.

While deferring—albeit grudgingly—to Congress' determination that diversity of broadcast expression is a *goal* of sufficient gravity to warrant race-conscious measures, the court of appeals rendered no deference to the *means* that Congress selected to achieve that goal: the distress sale policy at issue here. This was an error, for " '[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power.' " *Fullilove*, 448 U.S. at 480, *quoting National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949) (Jackson, J.). Judicial deference to Congress' chosen goals is hollow unless respect is also accorded the means Congress adopts to reach those goals.

In its 1987, 1988, and 1989 appropriations legislation, Congress expressly forbade the FCC to tamper with the distress sale policy, denying the FCC the

use of appropriated funds "to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to . . . *distress sales* . . . to expand minority and women ownership of broadcasting licenses . . . ." Pub. L. No. 100-202, 101 Stat. 1329 (1987) (emphasis added) (162a). *See also* Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988) (163a); Pub. L. No. 101-162, 103 Stat. 1020-21 (1989) (appendix hereto). To be sure, not even means chosen by Congress are beyond strict scrutiny when they employ distinctions based on race. *Wygant*, 476 U.S. at 280 n.7. That review must take place, however, with an awareness that "[i]t is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress . . . ." *Fullilove*, 448 U.S. at 483, *quoted in Croson*, 109 S. Ct. at 718.

Nor did the court of appeals defer to the FCC's discretion and expertise in determining the policies that would best promote diversity of expression through diversity of ownership. When in the past the court of appeals has intruded too deeply into the FCC's discretion in implementing its diversification policies, this Court has reversed it. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 600 (1981) ("the Commission is . . . vested with broad discretion in determining how much weight should be given to that [diversification] goal and what policies should be pursued in promoting it"); *National Citizens Committee for Broadcasting*, 436 U.S. at 810 ("the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance . . . ."). That discretion does not evaporate even where the FCC's choice of policies must be narrowly tailored because they embody racial distinctions.[12]

II. THE DISTRESS SALE IS NARROWLY TAILORED TO ADVANCE THE COMPELLING INTEREST IN DIVERSITY OF EXPRESSION IN BROADCASTING.

Race-conscious policies must be "narrowly tailored" to the achievement of a compelling governmental interest. *Fullilove*, 448 U.S. at 480; *Bakke*, 438 U.S. at 299; *Wygant*, 476 U.S. at 274. Narrow tailoring is such an elastic standard, however, that it is capable of invalidating most if not all such policies if applied with the utmost stringency on the basis of a reviewing court's hindsight. Here, despite Congressional approval of the distress sale policy, and despite a decade's experience that demonstrated its modest impact on nonminorities, the court of appeals struck the policy down in a manner that would make pursuit of its legitimate goals virtually impossible in the broadcasting industry. Thus applied, the narrow tailoring element of strict scrutiny ensured that the result of the court of appeals' examination in this case would indeed be "strict in theory, but fatal in fact." *Fullilove*, 448 U.S. at 507 (Powell, J.).

The court of appeals held on two bases that the distress sale policy is not narrowly tailored to promote programming diversity: first, that "the program unduly burdens Shurberg, an innocent nonminority," and second, that the policy "is not reasonably related to

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[12] "While a remedy must be narrowly tailored, that requirement does not operate to remove all discretion from the District Court in its construction of a remedial decree." *Paradise*, 480 U.S. at 185 (footnote omitted).

the interests it seeks to vindicate." 876 F.2d at 902-03 (2a). Neither ground can withstand scrutiny.

A. The distress sale policy does not impose unacceptable burdens on nonminority aspirants for broadcast licenses.

A narrowly tailored program need not "be limited to the least restrictive means of implementation." *Fullilove*, 448 U.S. at 508 (Powell, J.); *accord Paradise*, 480 U.S. at 184. Nor is it a constitutional defect that a program "may disappoint the expectations of nonminority firms." *Fullilove*, 448 U.S. at 484. "As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Wygant*, 476 U.S. at 280-81. But the burden borne by the disappointed applicant here was so light that the court of appeals' decision throws into doubt whether a race-conscious program can constitutionally entail *any* significant cost to a nonminority firm. As Chief Judge Wald wrote, the court of appeals' opinions suggest "that affirmative action is permissible only when nothing very important is at stake, when such a superabundance of opportunity exists that no one need go without." 876 F.2d at 952 n.47 (109a).

1. The policy's burden on nonminorities is "relatively light."

A race-conscious program is narrowly tailored when "[t]he actual 'burden' shouldered by nonminority firms is relatively light . . . ." *Fullilove*, 448 U.S. at 484. During the first ten years of its operation, the distress sale policy resulted in the transfer of 38 broadcast licenses to minority firms. 876 F.2d at 930 (61a). The FCC estimates that it approved a total of approximately 9,000 broadcast license transfers during that

period. FCC Petition for Rehearing and Suggestion for Rehearing *En Banc* 11-12. The distress sale policy thus affected about four-tenths of one per cent of license sales over the course of a decade. By comparison, the set-aside program upheld in *Fullilove* foreclosed nonminority firms from ten per cent of federal public works grants, or about .25 per cent of the annual construction expenditures in the United States. 448 U.S. at 484 n.72.

The two judges who made up the court of appeals majority avoided the obvious parallels with *Fullilove* by defining the opportunity to compete for a *single* station in a *single* locality as unique. 876 F.2d at 918 (Silberman, J.) (35a); *id.* at 933-34 (MacKinnon, J.) (68a). Judge Silberman adopted this exceedingly narrow focus because "[i]t is a Hartford station Shurberg *wants*," analagous in his view to "disqualifi[cation] from the *only* job currently available in a given community . . . ." *Id.* at 918, 918 (35a, 36a) (first emphasis added; second original). If that were the rule, the loss of any economic opportunity would be an unconstitutional burden if the nonminority could show that he wanted it badly enough. In *Fullilove*, the Court measured the extent of foreclosure on a national scale; here, the court of appeals limited itself to a universe of one license in one city.[13]

The broadcast industry was not closed to Shurberg, either in Hartford or elsewhere. Shurberg could still compete for, or seek to buy, broadcast licenses in

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[13] *Compare Ohio Contractors Ass'n v. Keip*, 713 F.2d 167, 173 (6th Cir. 1983) (foreclosure of nonminorities' opportunity must be measured by all contracts in state, not merely by contracts let directly by state government).

Hartford or in other markets.[14] "As in *Fullilove*, nonminority firms remain free to compete for the vast majority of licensee opportunities available." 876 F.2d at 951 (Wald, C.J., dissenting) (106a).

Alternatives to the distress sale policy for advancing minority ownership would entail far heavier burdens for innocent nonminorities. Incumbent licensees who have provided adequate or better service to the public receive a renewal expectancy that gives them an advantage in license renewal proceedings. *National Citizens Committee for Broadcasting*, 436 U.S. at 805; *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 506-7 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). Instances in which the incumbent licensee forfeits that expectancy (like Faith Center here), or in which a license is vacant, may well be relatively

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[14] Judge Silberman considerably overstated Shurberg's competitive disadvantage as an applicant in a comparative hearing for a license anywhere but in Hartford. 876 F.2d at 918 (35a). Local residency comes into play only when applicants are evenly matched on "quantitative" grounds, i.e., integration of ownership with full-time management of the station. A clearly superior proposal on quantitative grounds carries the day and cannot be overcome by "qualitative" enhancements such as local residency. *High Sierra Broadcasting, Inc.*, 96 F.C.C.2d 423, 432 (Rev. Bd. 1983). In addition, an applicant who plans to move to the community of service receives some credit for proposed local residency, and that factor, combined with a quantitatively superior proposal, can overcome the enhancement for existing local residency. *Id.*

Moreover, an applicant with no other media interests gains a considerable advantage on diversity grounds. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 395 (1965). If Shurberg has no other media interests, and proposes to participate fully as an owner-manager, place of residence occupies a secondary role in any comparative analysis.

unusual. But it is precisely in those instances where the FCC's minority ownership policies can have an impact without displacing an otherwise meritorious incumbent licensee. To oust an unoffending incumbent licensee to make room for a minority candidate would be a far heavier burden on innocent nonminorities. *Compare United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979) ("The plan does not require the discharge of white workers and their replacement with new black hirees"). If the burden on Shurberg is unacceptable—the loss of one opportunity for one aspiring broadcaster to compete for a license in his hometown—it is hard to see how any policy for increasing minority ownership could function constitutionally in the broadcast industry.

By contrast, the potential vacancy on which the distress sale policy operates is not created for race-related reasons, but rather by the incumbent's own failings or misconduct that have put its license at risk. Unlike the innocent nonminority teachers in *Wygant*, who stood to lose their jobs solely so that minority teachers would not have to lose theirs, the departing licensee in a distress sale has created its own predicament—and still cannot be compelled to relinquish its license to a minority buyer if it chooses to stand and fight.

2. The distress sale policy disrupts no "settled expectations."

Any burden on nonminorities imposed by a race-conscious policy is magnified if it consists of the loss of an existing means of livelihood, or a similarly "intrusive" detriment that "disrupt[s] . . . settled expectations" of innocent nonminorities. *Wygant*, 476 U.S. at 283. Ordinarily, layoffs cannot qualify as narrowly

tailored remedial measures because they "impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." *Id.* Hiring or promotion goals, on the other hand, usually involve an acceptable burden, because they "often foreclos[e] only one of several opportunities" and the burden "is diffused to a considerable extent among society generally." *Id.* at 282, 283.[15]

It is difficult, if not impossible, to discern an injury to Shurburg Broadcasting or to its sole owner comparable to the loss of a job. The distress sale to Astroline had no effect on Shurberg's existing activity whatsoever. Its only burden was the loss (or deferral) of one opportunity to enter a new field at a particular place and time and in a particular manner: as sole owner of a broadcast station in Hartford in 1985. As Chief Judge Wald pointed out, "Shurberg has been rendered no worse off than it was before Faith Center's fortuitous misconduct[.]" 876 F.2d at 952 (108a).

Moreover, what Shurberg lost was not the license to broadcast over Channel 18, but merely the chance to vie in a comparative hearing with Faith Center, Astroline, and any other aspirants who might also wish to compete for that license. As Chief Judge Wald noted, a nonminority applicant who wishes to seek a license through the vagaries of a comparative hearing "certainly lacks the legitimate expectation of contin-

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[15] Delay in promotion opportunities, for example, usually do not pose unacceptable burdens. *Howard v. McLucas*, 871 F.2d 1000, 1009 (11th Cir. 1989); *Higgins v. City of Vallejo*, 823 F.2d 351, 359-60 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 1310 (1989); *Youngblood v. Dalzell*, 804 F.2d 360, 365 (6th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987).

ued employment of someone already working." 876 F.2d at 951 (107a). Opportunities to compete can be valuable, to be sure, but they simply cannot compare with the loss of a job (or a license) on which its holder may have depended for much of his or her working life. *Compare Paradise*, 480 U.S. at 189 (Powell, J.) ("uncertain" whether or when nonminority state troopers would have been promoted absent race-conscious remedy) *with Bakke*, 438 U.S. at 320-21 n.54 (Powell, J.) (reservation of block of medical school places resulted in plaintiff's exclusion; there was "no question as to the sole reason for respondent's rejection. . . .").[16]

Finally, the court of appeals' analysis overlooks the essential public interest element of FCC licensing decisions. The FCC does not merely allocate economic opportunities among entrepreneurs; it selects persons who will serve as "fiduciaries for the public" (*League of Women Voters*, 468 U.S. at 377) and grants them the revocable right to use the public resource of the broadcast spectrum. Applicants simply cannot claim

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[16] *See also Johnson v. Transportation Agency, Santa Clara County, Calif.*, 480 U.S. 616, 638 (1987):

> [P]etitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner.

By contrast, Shurberg, at the time it sought comparative consideration for Channel 18, had not been called upon to demonstrate its qualifications as a licensee. Not only were its prospects in a comparative hearing conjectural, but its basic qualifications remained to be established.

a settled expectation to obtain a broadcast license free of public interest considerations.

> [I]n the allocation of broadcast licenses, there is no vested right or even a reasonable expectation of a right to own a station. Rather, there is only the public interest in the use of public airwaves.

Hilliard, *Constitutional Conflict over Race and Gender Preferences in Commercial Radio and Television Licensing*, 38 Kan. L. Rev. 343, 373 (1990).

3. The distress sale program does not allocate fixed percentages or numbers of opportunities.

A narrowly tailored policy ordinarily should avoid a race-based allocation of benefits according to a fixed, unyielding percentage or quota. *See Fullilove*, 448 U.S. at 473 (no "*inflexible percentages* solely based on race or ethnicity") (emphasis added); *Bakke*, 438 U.S. at 316 ("assignment of a *fixed number* of places to a minority group") (emphasis added); *Croson*, 109 S. Ct. at 728 (constitutionally infirm plan relied on "a *rigid numerical quota*" which "cannot be said to be narrowly tailored to any goal") (emphasis added).

The distress sale policy constitutes no such set-aside. Distress sale opportunities arise unpredictably, depending on the number of licensees whose basic qualifications are called into question, and who are willing to sell to a minority buyer. The FCC did not reserve for minority owners the 38 licenses actually transferred under the policy between 1978 and 1988. Rather, as Judge MacKinnon wrote, that number was "wholly fortuitous, being dependent upon decisions by third party licensees whose practices run afoul of FCC requirements." 876 F.2d at 931 (62a). Only those licensees who opt for a distress sale, and who find a willing buyer, actually transfer their licenses by that route; licensees who elect to contest their hearings, or who fail to find a buyer, are unaffected. Even if the FCC were cynically disposed to designate licenses for hearing simply to create more distress sale opportunities, it still could not force any licensee to transfer its license to a minority buyer. As Chief Judge Wald wrote, "Because of the unique and unpredictable nature of such situations, a distress sale can hardly be said to disrupt the settled expectations of potential licensees." 876 F.2d at 951 (107a).

More than a decade's experience with the policy dispels any reasonable fear that the policy could result in the reservation of a large portion of the broadcast industry for particular racial or ethnic groups. Distress sales have taken place at an average of fewer than four per year over a ten-year period. Judge MacKinnon's apprehension that the policy lacks any ceiling on the number of licenses that can be transferred (876 F.2d at 930, 931) (61a, 63a) might be cause for concern if there were no experience with the policy; in light of the policy's track record of modest success, it is no longer reasonable to harbor such doubts. The policy's lack of a specific ending date, or of a particular target of minority representation in the industry, is thus not a constitutional defect.

> It is . . . unsurprising that the Plan contains no explicit end date, for the Agency's flexible, case-by-case approach was not expected to yield success in a brief period of time. Express assurance that a program is only temporary may be necessary only if the program actually sets aside positions according to specific numbers.

Johnson v. Transportation Agency, Santa Clara County, Calif., 480 U.S. 616, 639-40 (1987). In this respect, of course, the distress sale program is *less* exclusionary than the program upheld in *Fullilove*, which reserved 10 per cent of construction funds for minority contractors, subject only to the flexibility provided by an administrative waiver system. By contrast, the distress sale policy has no minimum targets at all.

Judge MacKinnon found the distress sale policy constitutionally wanting despite its concededly "fractional" impact on the universe of broadcast licenses because the policy "will necessarily exclude *every* nonminority individual in *every* distress sale." 876 F.2d at 934 (68a) (emphasis in original). The policy is of course intended to increase the number of minority broadcasters; the fact that it actually does so in the small number of cases in which it is invoked cannot, standing alone, condemn it.

But Judge MacKinnon overstates the impact of the distress sale policy, even where it comes into play: nonminority rivals are *not* "necessarily exclude[d]" by a licensee's attempt to effect a distress sale. A nonminority applicant wishing to compete for the license can oppose the incumbent's application for approval of a distress sale. That is exactly what Shurberg did here, with partial success: the FCC ruled that if the sale to Astroline was not completed, no more distress sales would be authorized, and Channel 18 would be thrown open for competing applications from Shurberg and any other party that chose to file. *Faith Center, Inc.*, 99 F.C.C.2d at 1170 (122a). The FCC denied distress sale treatment for two other Faith Center stations, opening the way for nonminority

firms to file competing applications. *Faith Center, Inc.*, 82 F.C.C.2d 1 (1980), *recons. denied*, 86 F.C.C.2d 891 (1981); *see* 876 F.2d at 951 & n.41 (106a) (Wald, C.J., dissenting).

Moreover, the FCC does not permit a licensee facing a competing application before its case is designated for hearing to elect a distress sale. "Distress sales are an option only where no competing applicant is involved in the hearing. In comparative hearings the Ashbacker rights of the challenger to a full administrative comparison with the incumbent properly preclude departure of the existing licensee from the administrative process." *Clarification of Distress Sale Policy*, 44 Rad. Reg. 2d (P & F) 479, 480 n.3 (1978). And subsequent to a distress sale, the new licensee must face renewal proceedings, and the possibility of competing applications, just as any other licensee would.[17] Thus, even as to the license at issue, nonminorities retain the opportunity to compete before, during, *and* after the effectuation of a distress sale.

4. The FCC attempted race-neutral alternatives, to no avail.

A narrowly tailored policy should reflect attempts to reach the same goal by race-neutral means. *Wygant*, 476 U.S. at 280 n.6; *Croson*, 109 S. Ct. at 728. Those race-neutral means, however, must have a reasonable prospect of success in a foreseeable period of

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[17] Here, no party—including Shurberg—filed a competing application in the renewal "window" preceding the designation of Faith Center's license for hearing. Four other applicants—but not Shurberg—filed competing applications against Astroline in the renewal "window" period following sale of the station. FCC Petition for Rehearing and Suggestion for Rehearing *En Banc* at 13 n.19.

time; they are genuine alternatives only if they "promote the substantial interest about as well and at tolerable administrative expense." Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 Colum. L. Rev. 559, 578-79 (1975), *quoted in Wygant*, 476 U.S. at 280 n.6.

Here, it is beyond dispute that the FCC tried race-neutral remedies before adopting the distress sale policy: it promulgated and enforced equal employment opportunity rules, and it required licensees to meet with leaders of the minority community to ascertain community programming needs. 68 F.C.C.2d at 979-81 (130-132a). The FCC created the distress sale policy only after it expressly found that those alternatives were unsuccessful. *Id.* at 980 (133a). As Chief Judge Wald noted, "The Commission's general pursuit of diversified broadcasting has failed miserably in achieving meaningful minority representation." 876 F.2d at 949 (103a). *Compare Croson*, 109 S. Ct. at 728 ("there does not appear to have been *any* consideration of the use of race-neutral means") (emphasis added).

Judge Silberman suggested, in a single sentence, that the FCC should instead have adopted unspecified measures to publicize the availability of stations for sale, or to assist prospective purchasers with financing. 876 F.2d at 917 (32a). He did not explain how these measures could reasonably be expected to result in tangible results in the foreseeable future. The FCC cannot be required to exhaust every imaginable alternative that may occur to a reviewing court, regardless of the delay or the drain on its resources.

> A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down.

Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring). Like a district court, the FCC has substantial advantages in determining what means will be effective, stemming from its knowledge of the industry and first-hand experience with the problem. "[The district court's] proximate position and broad equitable powers mandate substantial respect for this judgment." *Paradise*, 480 U.S. at 184.

Moreover, the obvious race-neutral alternative—fostering program diversity by direct regulation of program content—is foreclosed by the First Amendment, as the FCC properly noted when it originally promulgated the distress sale policy. 68 F.C.C.2d at 981 (134a). " '[D]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.' " *National Citizens Committee for Broadcasting*, 436 U.S. at 796-97. *See also Columbia Broadcasting System*, 412 U.S. at 126 (avoidance of "enlargement of Government control over the content of broadcast discussion of public issues" is "problem of critical importance to broadcast regulation and the First Amendment").

5. Each distress sale receives the FCC's scrutiny.

Another hallmark of a narrowly tailored policy is the inclusion of an administrative mechanism that offers "reasonable assurance" that the policy's purposes will be accomplished and "that misapplications of the

program will be promptly and adequately remedied administratively." *Fullilove*, 448 U.S. at 487. Such a mechanism indisputably exists here: *every* distress sale application requires the FCC's individualized approval. Objectors such as Shurberg can be heard on whatever issues they wish to raise.[18]

The FCC is alert, for example, to ferret out distress sale purchasers who are merely minority "fronts." *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 855 (1982); *see Fullilove*, 448 U.S. at 487-88 ("There is administrative scrutiny to identify and eliminate from participation in the program [minority business enterprises] who are not 'bona fide' . . . spurious minority-front entities can be exposed."). Shurberg could and did raise such an objection before the FCC (which found that it had no merit). 99 F.C.C.2d at 1170-72 (124-26a).[19]

The court of appeals ignored the FCC's individualized consideration of each distress sale application, though Judge Silberman faulted the FCC for not

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[18] "Administrative procedures will be adequate if the decision-making body has the opportunity to consider the appropriateness of awarding each contract on the basis of race-conscious preferences." *Associated Gen. Contractors of California, Inc. v. City & County of San Francisco*, 813 F.2d 922, 937 n.30 (9th Cir. 1987).

[19] The FCC has been vigilant to police abuses of the distress sale policy. When the owners of two radio stations engaged in a sham distress sale that resulted in the unauthorized transfer of the stations back to one of their original owners, the Review Board invoked the FCC's ultimate sanction: it revoked both licenses for abuse of the distress sale policy. *Silver Star Communications-Albany, Inc.*, 3 F.C.C. Rcd. 6342 (Rev. Bd. 1988).

requiring each purchaser to demonstrate that he or she had suffered victimization or disadvantage from discrimination. 876 F.2d at 916 (31a).[20] This is beside the point, however, for the principal goal of the distress sale policy is to promote diversity of expression, not to remedy prior discrimination. As Chief Judge Wald wrote, "Any requirement that affirmative action plans bestow their benefits only on those who are themselves victims is therefore inapplicable to Congress' justification for the distress sale policy." 876 F.2d at 947 (97a).

B. The distress sale policy is reasonably related to its goals.

The court of appeals' second basis for finding that the distress sale policy lacks narrow tailoring was that it "is not reasonably related to the interests it seeks to vindicate," 876 F.2d at 902-03 (2a), in that no adequate basis assertedly exists to believe that increasing minority ownership will increase diversity of programming expression. Not only does this assertion conflict with the considered judgment of the FCC and several earlier decisions of the court of appeals, but it also contradicts the express findings of Congress that a nexus between diversity of ownership and diversity of expression indeed exists. If sustained, this ground would represent an extraordinary judicial incursion into Congress' legislative factfinding authority.[21]

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[20] Each distress sale purchaser *is*, however, required to demonstrate its qualifications as a broadcast licensee, as Astroline did in this case. 99 F.C.C.2d at 1170 (122a). *See Paradise*, 480 U.S. at 189 ("only qualified minority applicants are eligible for promotion") (Powell, J.).

[21] As an initial matter, it should be noted that even though

Judge Silberman acknowledged that the legislative history of the Communications Amendments Act of 1982 contains an express finding that diversity of ownership—and the inclusion of previously excluded minorities among the ranks of station owners—leads to diversity of programming. "The nexus between diversity of media ownership and diversity of programming sources has been repeatedly recognized by both the Commission and the courts." H. R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2237, 2284. But he rejected that finding because Congress did not make what he described as "historical findings of fact," did not refer "to evidence upon which the committee drew," and lacked "the support of any material developed in congressional hearings . . . ." 876 F.2d at 923-24 (45-47a).

This was incorrect both legally and factually. Judge Silberman's refusal to accept Congress' determination

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this rationale appears in the one-paragraph *per curiam* order, there is reason to believe that it represents solely Judge Silberman's view. Judge MacKinnon, concurring on the ground of burden on innocent nonminorities, wrote that "[t]he Silberman opinion also contends that the distress sale program, as a means of promoting diversity, is not a means that is reasonably related to its goal." 876 F.2d at 931-32 (64a). Judge MacKinnon pointedly dissassociated himself from this view, noting that "it is difficult to dispute the assertion that Congress found there was a nexus between minority ownership and programming diversity." *Id.* at 932 (66a). Though his personal view might differ, Judge MacKinnon wrote, "the congressional finding controls." *Id.* at 932 n.21 (65a). Thus, while Judge MacKinnon agreed with Judge Silberman that the distress sale policy was not reasonably related to the eradication of prior discrimination (*id.* at 931) (62-63a), he clearly did *not* agree that the policy was not reasonably related to diversification of broadcast expression.

runs squarely counter to *Fullilove*'s holding that "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." 448 U.S. at 478. This Court has cautioned against the separation of powers difficulties that would attend a judicial reexamination of the factual record on which Congress bases its legislative judgments and findings. "[W]e must be particularly careful not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981); *see also id.* at 82-83: "The District Court was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of *Congress'* evaluation of that evidence." (emphasis in original)[22]

Moreover, a legislative record existed for the 1982 legislation, though Judge Silberman failed to acknowlege it. The committee cited directly to the FCC's 1978 Taskforce *Report on Minority Ownership in Broadcasting*, and to the FCC's *1978 Policy Statement* that announced the creation of both the distress sale and tax certificate policies. The *1978 Policy Statement* in turn relied on the *Report of the National Advisory Commission on Civil Disorders* (U.S. Gov't Printing

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[22] *See also National Treasury Employees Union v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984) ("Such an intrusion into Congress' legislative deliberations would pose serious separation-of-powers problems, and neither the language nor logic of the Constitution compels such an inquiry."). Chief Judge Wald wrote in her dissent: "Given this factual background, my colleague's refusal to regard the statute as a considered congressional choice is simply judicial presumptiveness." 876 F.2d at 940 (83a).

Ofc. 1968) (the "Kerner Report") and on U.S. Commission on Civil Rights, *Window Dressing on the Set* (U.S. Gov't Printing Ofc. 1977). All three documents, each based on extensive factual investigation, documented the exclusion of minorities from positions of responsibility in the media, and the media's consequent failure to present minority viewpoints.[23] Before Congress adopted the 1987, 1988, and 1989 appropriations acts that prohibited abandonment of the distress sale policy, extensive hearings were held that delved into minority underrepresentation in the broadcast industry and its adverse effect on programming

[23] The Kerner Report devoted a chapter to media coverage of civil disorders, concluding that the inadequacies of that coverage were a symptom of the underrepresentation of blacks in journalistic positions of responsibility. *Kerner Report* at 201-13. "The journalistic profession has been shockingly backward in seeking out, hiring, training, and promoting Negroes. . . . [V]ery few Negroes in this country are involved in making [editorial] decisions, because very few, if any, supervisory editorial jobs are held by Negroes." *Id.* at 211.

The Civil Rights Commission Report examined at great length the portrayals of minorities in the U.S. television industry, the inadequacies of which the Commission attributed to "the extent to which minorities and women—particularly minority women of each of the groups studied—continue to be underrepresented on local station work forces and to be almost totally excluded from decisionmaking and important professional positions at those stations." *Window Dressing on the Set* at 3.

It should be noted that part of the "abundant historical basis" (448 U.S. at 478) that supported Congress' creation of the set-aside program in *Fullilove* was—as here—a Civil Rights Commission report on the barriers encountered by minorities in gaining government contracts. 448 U.S. at 466-67.

diversity.[24] An extensive factual record thus existed, and Congress expressly relied on it.

Judge Silberman criticized the Conference Report's findings (and the FCC's conclusions on which it relied) as "in the nature of *predictions* as to future behavior," rather than conclusions drawn from a factual record. 876 F.2d at 923 (emphasis in original) (45a). But this Court has repeatedly held that the FCC's judgments as to how best to promote diversity in broadcasting are (and must be) predictive. "[T]he Commission's decisions must sometimes rest on *judgment and prediction* rather than pure factual determinations." *WNCN Listeners Guild*, 450 U.S. at 594 (emphasis added). "[C]omplete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " *National Citizens Committee for Broadcasting*, 436 U.S. at 814, *quoting FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

Moreover, the proposition that minority ownership would encourage diversity of programming and pres-

[24] *Parity for Minorities in the Media—Hearings on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 1, 3, 125, 135, 147-49, 159-67, 194 (1983); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 1, 4, 7-8, 138, 161 (1983); *Minority-Owned Broadcast Stations—Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 1, 2, 51, 56-57, 89 (1986).

entation of fresh viewpoints has seemed so reasonable as hardly to require proof.

> [I]t is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news. . . . Reasonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors.

TV 9, Inc., 495 F.2d at 938 (footnote omitted). *See also West Michigan*, 735 F.2d at 610. A nexus between minority employment and programming expression seemed reasonable to this Court, when it stated that the FCC's equal employment regulations "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976) (*dictum*).

Finally, Justice Powell's pivotal opinion in *Bakke*, confirming the ability of a university to take race into account in assembling a diverse student body, required neither evidence nor findings to establish the nexus between diversity and educational quality. Rather, he wrote, educational excellence is "*widely believed* to be promoted by a diverse student body[,]" 438 U.S. at 312 (emphasis added), citing only an article by a university president who said that "[i]n the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs." *Id.* at 313 n.48. Belief in the contribution of diversity to education rested not on evidence or findings, Justice Powell said, but on "our tradition and experience." *Id.* at 313.

In short, Judge Silberman invaded the province of Congress when he held that the distress sale program lacked a reasonable relation to its ends. The nexus between minority ownership and programming diversity rests on Congressional findings, supported by evidence, and on the expert judgment of the Commission, confirmed repeatedly by reviewing courts.[25] Evidentiary review of Congress' legislative factfinding is neither warranted nor constitutionally appropriate.

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[25] Unlike the construction industry in *Fullilove*, the broadcast industry is subject to direct, ongoing congressional supervision. For the past fifty years, Congress has compiled a record that supports the conclusion that there is a nexus between program diversity and minority/female ownership of broadcast stations.

Hilliard, *supra* p. 36, at 372.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS ACT, 1990

FEDERAL COMMUNICATIONS COMMISSION
SALARIES AND EXPENSES

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* * * *Provided*, That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in the Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended 52 R.R.2d 1313 (1982) and Mid-Florida Television Corp., 60 F.C.C.2d 607 Rev. Bd. (1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending conclusion of the inquiry: * * *